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BREAKING THE CEMENT: VENEZUELA'S MOVE TO NATIONALIZE CEMEX LEADS TO
DISPUTE OVER ARBITRAL JURISDICTION

By
Shari Manasseh*

I. INTRODUCTION

In the recent years, Venezuelan President Hugo Chavez announced his plans to nationalize foreign-owned cement companies. The cement companies of CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. (CEMEX) initiated this arbitration proceeding against the Bolivarian Republic of Venezuela (Venezuela) at the International Centre for Settlement of Investment Disputes (ICSID).¹ CEMEX is the largest supplier of cement in Venezuela.² The dispute arose out of President Chavez's seizure of Cemex Venezuela (CemVen) carried out by three decrees and by occupation of CEMEX plants by Venezuelan armed forces at the same time.³ This proceeding focuses on whether ICSID has jurisdiction over this dispute under the Venezuela-Netherlands Bilateral Investment Treaty (BIT) and/or Article 22 of Venezuela's Investment Law (Article 22).

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¹ CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No: ARB/08/15, Date of Decision on Jurisdiction of 30 December 2010 (Gilbert Guillaume, Georges Abi-Saab and Robert B. von Mehren) [hereinafter *Jurisdiction*].

² CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No: ARB/08/15, Date of Decision on the Claimant's Request for Provisional Measures of 3 March 2010 at 3 (Gilbert Guillaume, Georges Abi-Saab, and Robert B. von Mehren) [hereinafter *Provisional Measures*].

³ *Id.* at 9.

II. FACTUAL BACKGROUND AND SUMMARY

CEMEX initiated the Request for Arbitration to complain about the nationalization of Venezuelan company, CemVen, in which they held an indirect ownership interest.⁴ Venezuela submitted information regarding the structure of the companies involved in the case to which a few of their arguments are dependent upon. Venezuela submitted that a Mexican company, Cemex, S.A.B. de C.V. owns 100% of Cemex España S.A., which owns 100% of one of the Claimants, a Dutch company called Cemex Caracas.⁵ Cemex Caracas then owns 100% of the other Claimant, another Dutch company called Cemex Caracas II.⁶ Cemex Caracas II owns 100% of Vencement Investments (Vencement).⁷ Vencement is a company incorporated in the Cayman Islands.⁸ As of 2002, Vencement owns 75.7% of CemVen, the cement company that operated in Venezuela.⁹

CEMEX contended they were deprived of their rights of ownership over CemVen.¹⁰ CEMEX submitted their claims arose out of Venezuela's seizure of CemVen, which was carried out by decrees of May 27, 2008, August 15, 2008, and August 19, 2008 and by the occupation of CEMEX plants by Venezuelan armed forces at the same time.¹¹ In their Request for Arbitration, CEMEX asked for a declaration noting the aforementioned breaches and an order that "[Venezuela] restore to [CEMEX] their shares in, and complete and exclusive control of, [CemVen]."¹² Thus, CEMEX submitted the Tribunal has jurisdiction because of

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.*

⁷ *Provisional Measures* at 6.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Jurisdiction* at 9.

¹² *Provisional Measures* at 3.

Article 22 and from the BIT.¹³ Venezuela, however, objected to both of CEMEX's alleged bases of ICSID jurisdiction.¹⁴

III. CEMEX'S ARGUMENTS FOR JURISDICTION

A. *Jurisdiction under the Netherlands-Venezuela BIT*

CEMEX argued, "the sole question facing the Tribunal under the... BIT is whether Claimants' indirect equity stake in [CemVen] S.A.C.A is an 'investment' for purposes of Article 1(a)."¹⁵ To which, Claimants answered a "resounding 'yes'."¹⁶ CEMEX defined "investment" in Article 1(a) of the BIT as non-exhaustive and extending to indirect investments.¹⁷ CEMEX relied on prior arbitral decisions to support their broad interpretation of "investment."¹⁸ CEMEX also submitted Venezuela could not "overcome decades of unanimous case law" and that once jurisdiction is established under the BIT, then the Tribunal may hear all claims from the Request for Arbitration.¹⁹ Moreover, CEMEX argued other provisions of the BIT also reinforce their conclusion that the BIT covers indirect investments.²⁰

B. *Jurisdiction Under Article 22 of the Investment Law*

Translated into English, Article 22 could read as:

¹³ *Jurisdiction* at 16.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 13.

¹⁶ *Id.*

¹⁷ *Id.* at 9.

¹⁸ *Jurisdiction* at 9.

¹⁹ *Id.* at 13.

²⁰ *Id.* at 9.

Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.²¹

CEMEX argued Article 22 “separately and independently from the BIT” conferred jurisdiction on ICSID.²² CEMEX considered Venezuela’s narrow interpretation of ownership or control not well founded.²³ Furthermore, CEMEX considered their investment as an “international investment” and that they were “international investors” for purposes of the Investment Law.²⁴ Overall, CEMEX referred to the intention of the drafters of Article 22 and stressed consent to arbitration in Article 22 did not conflict with Venezuelan Law.²⁵

²¹ *Id.* at 18.

²² *Id.* at 10.

²³ *Jurisdiction* at 10.

²⁴ *Id.*

²⁵ *Id.* at 10.

IV. VENEZUELA'S ARGUMENTS AGAINST ICSID JURISDICTION

A. *Jurisdiction Under the BIT*

Venezuela claimed CEMEX's indirect ownership of the CemVen precluded them for coverage under the BIT.²⁶ Particularly, Venezuela argued Article 1(a) of the BIT defined "investments" to include "every kind of asset" but that it did not refer to the subject of direct or indirect ownership or control.²⁷ Venezuela, thus, contended the absence of the referral to direct or indirect ownership or control from the definition of investment in comparison to other BITs showed that the BIT did not cover indirect investors.²⁸

Furthermore, Venezuela argued the BIT's broad definition of "national" reinforced their interpretation of the BIT and that it only concerned investments located in the territory of the Contracting Parties.²⁹ Venezuela argued CEMEX qualified as Dutch Nationals under the BIT because of their incorporation in the Netherlands.³⁰ Venezuela, however, noted that CEMEX do not themselves have investments in Venezuela.³¹ Venezuela claimed CEMEX's indirect investments did not entitle them to assert claims for alleged violation of the BIT.³² Venezuela further argued CEMEX failed to explain the absence of Vencement as a party to this proceeding.³³ Overall, Venezuela argued CEMEX are not the "proper parties to this proceeding."³⁴

²⁶ *Id.* at 7.

²⁷ *Id.*

²⁸ *Jurisdiction* at 7.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Jurisdiction* at 11.

³⁴ *Id.* at 7.

B. Jurisdiction under Article 22 of Venezuela's Investment Law

Venezuela argued Article 22 of the Investment Law did not provide the “requisite express and unequivocal consent to ICSID arbitration” required by Article 25 of the ICSID Convention.³⁵ Venezuela contended the Investment Law must be interpreted in the light of Venezuelan legal principles and though while it may not be definitive, it played an important role in the Article 22 analysis.³⁶ Venezuela added under their law, consent to arbitration must be clear, express and unequivocal.³⁷ Venezuela referred to publications and commentaries on the Investment Law, Venezuelan legal principles and to a Venezuelan Supreme Court decision.³⁸ Ultimately, Venezuela concluded that a comparison of Article 22 with other national investment laws and ICSID case law supported their claim.³⁹

Furthermore, Venezuela submitted neither CEMEX nor themselves consented to ICSID jurisdiction as required by Article 25.⁴⁰ Article 25(1) indicated, “the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment...which the parties to the dispute consent in writing to submit to the Centre.”⁴¹ Venezuela claimed the writing requirement in Article 25 should be satisfied through a contract or in a document accepting an offer previously made.⁴² Venezuela argued neither CEMEX’s letter “accepting the Republic’s offer of consent to ICSID arbitration contained in Article 9(1) of the Dutch Treaty” nor the Request for Arbitration “made any reference to, or purported to accept, any consent of the Republic for ICSID arbitration supposedly contained in Article 22 of the Investment Law.”⁴³ According to Venezuela, CEMEX reserved their right in

³⁵ *Id.* at 8.

³⁶ *Id.* at 18.

³⁷ *Id.* at 19.

³⁸ *Jurisdiction* at 8.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 16.

⁴² *Id.* at 7.

⁴³ *Jurisdiction* at 8.

a footnote in the request for provisional measures and that it did so after having initiated the arbitration without invoking expressly the Investment Law.⁴⁴ Venezuela ultimately argued the footnote could not be considered as a written consent given in due time and as such CEMEX did not satisfy the writing requirement of Article 25.⁴⁵

Alternatively, Venezuela submitted that “[CEMEX] was [not] the “owner” of CemVen, which is the alleged “investment” in this case.”⁴⁶ According to Venezuela, CEMEX did not directly control CemVen and as such, they did not qualify as “international investors” under the Investment Law.⁴⁷

V. DECISION OF THE TRIBUNAL

CEMEX submitted that the tribunal could reach a conclusion on the BIT without analyzing Article 22 since Article 9 of the BIT embodied consent even if under Article 22 jurisdiction lacked.⁴⁸ Venezuela contended that both issues be addressed by the Tribunal.⁴⁹ The Tribunal agreed with Venezuela and addressed both issues.⁵⁰

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Jurisdiction* at 17.

⁴⁹ *Id.*

⁵⁰ *Id.*

A. *Tribunal's Decision Regarding Article 22 of the Investment Law*

1. Standard of Interpretation

The parties disagreed on the interpretation of Article 22 – CEMEX submitted Venezuela consented to ICSID jurisdiction while Venezuela contended the text did not provide such consent.⁵¹ Thus, in order to clarify the meaning of Article 22, the Tribunal began by determining the standard of interpretation to be used.⁵² The Tribunal noted that under Article 41(1) of the ICSID Convention, they were the “judge of its own competence.”⁵³ As such, the Tribunal found the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts could not control the Tribunal’s decision on its own competence.⁵⁴ Instead, the Tribunal found the interpretation must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States.⁵⁵

2. Content of the Standard

The Tribunal then discussed the writing requirement for consent pursuant to Article 25 of the ICSID Convention.⁵⁶ The Tribunal noted that while Article 25 detailed consent in writing as necessary, the text did not give any further indication about either the manner or timing of such consent or the way in which it must be

⁵¹ *Id.* at 18.

⁵² *Id.*

⁵³ *Jurisdiction* at 19.

⁵⁴ *Id.*

⁵⁵ *Id.* at 22.

⁵⁶ *Id.*

interpreted.⁵⁷ The Tribunal found persuasive a distinction recognized by the International Law Commission of the United Nations between rules governing States' unilateral declarations in international law: (a) declarations formulated in the framework and on the basis of a treaty, and (b) other declarations made by States in the exercise of their freedom to act on the international plane.⁵⁸ While both declarations may have the effect of creating international obligations, the Tribunal found when considering declarations not made within the framework and on the basis of a treaty, the utmost caution is required when deciding whether or not those declarations create such obligations.⁵⁹ The Tribunal found, nonetheless, the rules of interpretation are different when unilateral declarations are formulated in the framework of a treaty and on the basis of such a treaty.⁶⁰

Accordingly, the Tribunal found persuasive the method by which the International Court of Justice (ICJ) interpreted unilateral declarations of compulsory jurisdiction.⁶¹ The ICJ stressed that every declaration "must be interpreted as it stands, having regard to the words actually used."⁶² When interpreting, the ICJ begins with the text and if the text is ambiguous, by giving due consideration to the context and examining the evidence regarding the circumstances of its preparation and the purposes intended to be served.⁶³ It is based on these rules of international law, the Tribunal used to interpret Article 22.⁶⁴ The Tribunal also found relevant but not determinative domestic law and international law of treaties.⁶⁵

⁵⁷ *Id.*

⁵⁸ *Jurisdiction* at 23.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 24.

⁶³ *Jurisdiction* at 24.

⁶⁴ *Id.*

⁶⁵ *Id.*

3. Interpretation of Article 22

Following the ICJ approach, the Tribunal began their interpretative analysis with the text of Article 22.⁶⁶ According to Article 22, disputes arising under the BIT or to which the ICSID Convention is applicable “shall be submitted to international arbitration according to the terms of the respective treaty or agreement, *if it so provides*.”⁶⁷ The Tribunal explained the parties agreed that the provision created an obligation to go to arbitration subject to certain conditions but that they disagreed on the interpretation to be given to the words “if it so provides.”⁶⁸ For CEMEX, the Tribunal noted, “it” referred to the ICSID Convention and that Article 22 should be considered a “binding direction that the State must submit to international arbitration all controversies to which the ICSID Convention applie[d]”.⁶⁹

On the other hand, the Tribunal described that Venezuela contended that Article 22 did not itself constitute a general consent to ICSID arbitration.⁷⁰ The Tribunal further explained Venezuela argued that Article 22 required such disputes be submitted to arbitration according to the terms of the ICSID Convention.⁷¹ Particularly, “if it so provides” meant “that consent to ICSID arbitration of a particular dispute or class of disputes has been given in writing both by the Republic and the investor.”⁷² Thus, as the Tribunal expressed, Venezuela argued in the absence of such written consent, ICSID did not have jurisdiction in the present case.⁷³

⁶⁶ *Id.* at 25.

⁶⁷ *Id.*

⁶⁸ *Jurisdiction* at 25.

⁶⁹ *Id.*

⁷⁰ *Id.* at 26.

⁷¹ *Id.* at 26.

⁷² *Id.*

⁷³ *Jurisdiction* at 26.

The Tribunal explained grammatically the “it” that is in dispute between CEMEX and Venezuela referred to the preceding words “treaty or agreement”, which would include the ICSID Convention.⁷⁴ The Tribunal observed the term “treaty” as comprehensive and normally included “conventions.”⁷⁵ The Tribunal, however, explained the word “so” could be interpreted in two ways: (a) if the treaty, agreement or convention provided for international arbitration; or (b) if the treaty, agreement or convention created an obligation for the State to submit disputes to international arbitration.⁷⁶ In the first case, the word “so” referred to international arbitration whereas in the second case it referred to the obligation to submit disputes to international arbitration.⁷⁷

In numerous cases concerning unilateral declaration, the ICJ decided it “could not base itself on a purely grammatical interpretation of the text.”⁷⁸ Facing a similar situation, the Tribunal decided it needed to look further to interpret Article 22.⁷⁹

4. The Principle of Effet Utile⁸⁰

CEMEX invoked the principle of *effet utile* (*ut res magis valeat quam pereat*) as they submitted, “under the doctrine of *l’effet utile*, Article 22 should ...be interpreted as Venezuela’s binding consent to ICSID arbitration.”⁸¹

⁷⁴ *Id.* at 27.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Jurisdiction* at 28.

⁷⁹ *Id.*

⁸⁰ The principle of *effet utile* indicates that a treaty instrument must be interpreted in the manner most favorable to the fulfillment of the purposes of the organization concerned. INTERNATIONAL DECISION: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. Advisory Opinion. <<http://www.icj-cij.org>>. International Court of Justice, April 29, 1999, 93 Am. J. Int'l L. 913 (1999).

⁸¹ *Jurisdiction* at 28.

Venezuela, on the other hand, contended that the function of Article 22 was to acknowledge and confirm the commitments of Venezuela to submit disputes to international arbitration in accordance with its treaty obligations and that such acknowledgment and confirmation has an *effet utile*.⁸²

In analyzing this dispute, the Tribunal found persuasive ICJ case law.⁸³ In one case, the ICJ recognized the principle of *effet utile* should be generally applied when interpreting the text of the treaty.⁸⁴ In another case, the ICJ found *effet utile* should be interpreted in a manner compatible with the effect sought by the reserving State.⁸⁵

The Tribunal agreed with both rulings of the ICJ.⁸⁶ The Tribunal also explained the principle of *effet utile* would be unhelpful in Article 22 interpretation.⁸⁷ The Tribunal, thus, noted in order to interpret Article 22; they would consider its context, purpose, and the circumstances of its preparation in order to determine Venezuela's intention when adopting Article 22.⁸⁸

5. Context and Purpose

The Tribunal began their analysis of the context and purpose of Article 22 with an analysis of Article 1 of the Investment Law.⁸⁹ The Tribunal explained that according to Article 1, the aims of the Investment Law were in general terms comparable to those of treaties on promotion and reciprocal protection of investments.⁹⁰ The Tribunal expressed, however, the rights accorded to international investors are often qualified in order not to affect the application of

⁸² *Id.*

⁸³ *Id.* at 30.

⁸⁴ *Id.* at 29.

⁸⁵ *Id.* at 30.

⁸⁶ *Jurisdiction* at 30.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 32.

⁹⁰ *Id.* at 33.

Venezuelan Law or the rights of Venezuelan investors.⁹¹ Thus, the Tribunal further explained, the Investment Law differed in some respects from BITs.⁹² Specifically, the Tribunal conceded that Venezuela incorporated a mandatory arbitration clause in the seventeen BITs concluded before 1999.⁹³ The Tribunal, however, noted that those previous clauses did not imply that Venezuela would be ready to accept such an obligation with which it did not have a BIT.⁹⁴ Thus, the Tribunal described one could not draw from Article 1 that Article 22 must be interpreted as having established consent by Venezuela to submit to arbitration all potential disputes falling within the protection of the ICSID Convention.⁹⁵ As a result, the Tribunal concluded when Venezuela adopted Article 22, they did not intend to give in advance a general consent to ICSID arbitration in the absence of any Treaty.⁹⁶

6. Legislative History

The Tribunal, then, began to analyze the legislative history of Article 22 with the hopes that it would provide more useful information about the intention of the drafters of the Investment Law.⁹⁷ The Investment Law, however, was a decree-law and thus, not discussed in Parliament.⁹⁸ The Tribunal admitted, therefore, they have no “direct information about its preparation.”⁹⁹ According to the Tribunal, CEMEX submitted the drafters of Article 22 intended it to be a binding offer of ICSID Arbitration.¹⁰⁰

⁹¹ *Jurisdiction* at 33.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Jurisdiction* at 35.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

7. Conclusion

Ultimately, the Tribunal concluded, if Venezuela intended to give its advance consent to ICSID arbitration in general then it would have been easy for the drafters of Article 22 to express that intention clearly by using any of the other clauses.¹⁰¹ Therefore, the Tribunal formulated that Venezuela did not establish their intention and, as a result, Article 22 did not provide a basis for jurisdiction of the Tribunal in the present case.¹⁰²

B. Tribunal's Decision On The BIT

Article 9(1) of the BIT provided that:

[D]isputes between one Contracting Party and a national of the other Contracting party concerning an obligation of the former under this agreement in relation to an investment of the later, shall at the request of the national concerned be submitted to the International Centre for the Settlement of Investment Disputes for settlement by arbitration or conciliation under [the ICSID Convention.]¹⁰³

Article 9 added that “each contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this article to international arbitration in accordance with the provisions of this Article.”¹⁰⁴

¹⁰¹ *Jurisdiction* at 35.

¹⁰² *Id.*

¹⁰³ *Id.* at 39.

¹⁰⁴ *Id.*

CEMEX contended that the Tribunal had jurisdiction under the BIT, while Venezuela denied such claim.¹⁰⁵ Venezuela referred to the claims made by CEMEX that arose from their nationalization of CemVen.¹⁰⁶ Venezuela alleged that based on the complex structure of the corporations involved in this proceeding that CEMEX, as indirect investors, did not have an investment in Venezuela's territory.¹⁰⁷

The Tribunal observed that numerous ICSID decisions and awards considered "indirect investments."¹⁰⁸ The Tribunal noted the BIT contained no explicit reference to indirect investments but nevertheless described the definition of investment as very broad.¹⁰⁹ The Tribunal found relevant prior arbitral case law to which investments were defined as broad and non-exhaustive.¹¹⁰ Thus, the Tribunal concluded that investments as defined in Article 1 of the BIT could be indirect.¹¹¹

The Tribunal further explained by definition an indirect investment could be considered as an investment made by an indirect investor.¹¹² As the BIT covered indirect investments, the Tribunal found it entitled indirect investors to assert claims for alleged violations of the Treaty convening the investments that they indirectly owned.¹¹³ Furthermore, the Tribunal noted that when the BIT mentioned investments "of" nationals of the other Contracting Party, it meant that those investments must belong to such nationals in order to be covered by the Treaty.¹¹⁴ The Tribunal, explained, however, that such description did not imply

¹⁰⁵ *Id.*

¹⁰⁶ *Jurisdiction* at 39.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 41.

¹⁰⁹ *Id.* at 42.

¹¹⁰ *Id.*

¹¹¹ *Jurisdiction* at 43.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

that they must be “directly” owned by those nationals.¹¹⁵ Additionally, the Tribunal, expressed when the BIT mentioned investments made “in” the territory of a Contracting party, the BIT required that the investment itself be situated in that territory.¹¹⁶

The Tribunal, thus, concluded the CEMEX had *jus standi* in the case and Venezuela’s objection to the ICSID jurisdiction could not be upheld.¹¹⁷ Ultimately, the Tribunal concluded they did not have jurisdiction over the claims under Article 22 of the Investment but did so under the BIT.

VI. CONCLUSION

This arbitration proceeding is significant because it focuses on a relatively recent legislation of Venezuela that has caused much spark and controversy. Particularly, what remains to be seen is to what extent the nationalization policies have frightened foreign investment and whether Venezuela will ever be able to attract foreign investors once again. Although, if Chavez should have to pay CEMEX, foreign investment into Venezuela may continue as it may indicate to many foreign-owned companies justice granted.

Additionally, the Tribunal’s proclamation that domestic laws are relevant but still not determinative in whether the Tribunal has jurisdiction highlights the Tribunal’s right to *competence-competence*. The Tribunal’s refusal to find Venezuelan authority precedent illustrates the Tribunal’s desire to remain as an autonomous and neutral entity, an essential factor for international arbitration.

¹¹⁵ *Id.*

¹¹⁶ *Jurisdiction* at 44.

¹¹⁷ *Id.*